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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 349

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Petitioner,

vs.

MARY MILLER, ADMINISTRATRIX OF THE ESTATE OF FRED A. MILLER, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT.

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Counsel for Petitioner.

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No. 349

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Petitioner,

vs.

MARY MILLER, ADMINISTRATRIX OF THE ESTATE OF FRED A. MILLER, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE.

Southern Pacific Company, a corporation, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, First Appellate District, Division One, rendered April 30, 1953 (R. 249), as modified by the order of May 29, 1953 (R. 274), denying a petition for rehearing. After decision of the District Court of Appeal, on June 6, 1953, and within the time allowed (Rule 28(a) of the Rules on Appeal) your petitioner, as appellant and petitioner, served and filed in the Supreme Court of the State of California a petition for transfer of the cause into the Supreme Court of the

State of California for its hearing and determination there. That petition was denied on June 17, 1953.

The judgment sought to be reviewed is in a cause entitled and numbered in the District Court of Appeal of the State of California, First Appellate District, Division One, "Mary Miller, Administratrix of the Estate of Fred A. Miller, Deceased, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant", 1 Civil No. 15391. The judgment of the District Court of Appeal affirmed a judgment of the Superior Court of the State of California in and for the City and County of San Francisco in favor of plaintiff, Mary Miller, Administratrix of the Estate of Fred A. Miller, Deceased, and against defendant and petitioner, Southern Pacific Company, in an action for damages for personal injuries brought under the Federal Employers' Liability Act.

Proceedings in This Case

This action was one for damages for the death of a railroad brakeman employed by petitioner, Southern Pacific Company, alleged to have been caused by the negligence of the employer. Plaintiff had a verdict and judgment in the trial court (R. 19-20) and, agreeably to the laws of California, the defendant employer appealed to the District Court of Appeal of the State of California, First Appellate District (R. 24; Cal. Const., Art. VI, §§ 4, 4a, 4b). That court having affirmed the judgment, and denied a rehearing, and the Supreme Court having denied a timely petition to have the cause heard in the Supreme Court, as indicated above, two justices voting for a hearing, your petitioner has exhausted all of its remedies in the state courts, the highest court of the state which would have jurisdiction of the cause having declined to assume that jurisdiction by the order of the Supreme Court of June 17, 1953, the decision

to be reviewed is that of the District Court of Appeal, First Appellate District, Division One, as modified, the record is the record lodged in that court, as supplemented by the record of the Supreme Court showing the proceedings in that court and the writ should issue to the District Court of Appeal.

The question of the legal sufficiency of the evidence to sustain the judgment was appropriately raised in the trial court by motion for a directed verdict, which was denied (R. 210) and by motion for judgment notwithstanding the verdict (R. 21) which was denied (R. 24).

Opinions Below

The opinion of the District Court of Appeal of the State of California, First Appellate District Division One, of April 30, 1953 (R. 249), is reported in 117 A. C. A.[1] 643 and 256 P2d 603. The order of that court denying the petition for rehearing and modifying the opinion is reported in 118 A. C. A. 137 (R. 274). The order of the Supreme Court of the State of California of June 17, 1953, denying the petition for a hearing is reported at page 2 of the minutes of that court following p. 168 of 41 A. C.[2] (R. 292). For the convenience of the Court, and because it will be used, the opinion and order of the District Court of Appeal are appended to this petition (App. A.).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257(3) and 2101(c).

The jurisdiction of this Court in the general sense, and the proposition that the judgment for review is that of the District Court of Appeal of the State of California, are sustained by the following cases, among others: *Hammerstein* v. *Superior Court of California*, 340 U.S. 622; *Adam* v.

Saenger, 303 U.S. 59; *Chicago etc. R. Co.* v. *Ind. Com'n.*, 284 U.S. 296. Jurisdiction of this Court in the sense that a federal question, appropriate for the decision of this Court is involved, is sustained by *Reynolds* v. *Atl. C. L. R. Co.*, 336 U.S. 207, and those decisions generally of this Court reviewing decisions of state courts upon the sufficiency of the evidence to sustain a judgment in an action under the Federal Employers' Liability Act (45 U. S. C. § 51ff).

Federal Statute Involved

This action was brought and prosecuted under the Federal Employers' Liability Act as amended in 1939, Act of April 22, 1908, c. 149, 35 Stat. 65; Act of August 11, 1939, c. 685, 53 Stat. 1404; 45 U.S.C. § 51ff. A copy of the applicable provisions, as they appear in 45 U.S.C., is appended hereto (App. B.).

Questions Presented

A railroad brakeman, member of a freight train crew, when last seen was standing beside his train in a terminal yard. The train was on a sidetrack. He was standing between the train and the next track which was the main line track. A fast passenger train, approaching in plain sight for a distance of some four miles, with headlight shining, its bell ringing and its whistle sounded as it approached the point where the deceased was last seen, passed. After the fast passenger train had passed the deceased was found critically injured. It was obvious he had been struck by the passenger train. The questions presented by the case are: Is there any evidence legally sufficient to sustain a verdict for the administratrix of the deceased upon the ground that defendant negligently failed to provide him with a safe place to work or was negligent in the operation of the passenger train? Is not the decision below in square conflict with *Kansas City So. Ry. Co.* v. *Jones*, 276 U.S. 303?

Statement of the Case

With the exception of a few matters which we shall point out the opinion of the District Court of Appeal of the State of California, sufficiently and accurately states the physical facts and what happened. With a limited number of necessary additions we shall rest on this statement and in this petition state the facts summarily and only so far as it is necessary to give point to the grounds urged in support of the granting of a writ of certiorari by this Court. The opinion is appended as part of Appendix A to this petition.

Early in the morning a long freight train, Second 620, was being made up in the yard at Gerber, California to go north. It was being prepared on the first track west of the main line and parallel to the main line. The deceased was a member of its crew, a brakeman, an experienced railroad man, thoroughly familiar with conditions in the yard, the operation being conducted and, as we shall point out, the approach, from the north, of a fast passenger train. He was taking part, as it was required of him from time to time, in the general work of preparing the freight train. When last seen by anyone he was standing near the head end of the train, at about the center of the first unit of the Diesel locomotive, between the freight train and the main line track. At that time the headlights of a fast passenger train, First 11, approaching from the North *were in sight a little over 4 miles away.* As the passenger train approached and passed Newton, another brakeman, was located substantially as the deceased was located. Newton was between the freight train and the main line but to the south of the deceased by about the length of 3 units of the Diesel locomotive and 3 cars. Newton had the same duties as the deceased. Newton was not injured. After the passenger train passed Newton found the deceased on the ground, unconscious, between the main line and the freight train at about

the rear of the first unit of the Diesel locomotive of the freight train. "No one saw Miller at the time of the accident. The circumstances warrant the inference that he was injured during the passage of First 11, by coming in contact with it. Precisely how that contact occurred we have no direct information."[3] Nor, we may add, any indirect information, although Newton was looking toward where Miller and his light were when he was last seen by conductor Birdwell.

Although not stated in terms, as we shall state them, the following cardinal considerations of fact appear from the opinion of the District Court of Appeal:

1. The fixed physical features of the locale were exactly as designed and as they were intended to be. The tracks, roadbed, footing conditions, signals, and oil and water columns, were exactly as intended and designed and there was no defect or claim of defect in respect of any of them. There was no evidence that they did not meet normal railroading standards nor was there any evidence of any standard from which they deviated.[4]

2. The equipment being used was normal standard equipment all in proper working order.

3. The operations being carried out were normal for the time and place. As the opinion points out, the freight trains could not start north until the arrival of the passenger train, First 11. Naturally, these trains would be prepared and tested just before they left which would be waiting the arrival of First 11. There is no suggestion in the evidence that this was not proper and that it was proper is the only meaning which can be given to the modification of the opinion below that "We do not perceive, nor do we infer that the jury impliedly found, a duty resting upon defendant to adjust * * * its streamliner schedule to the operation of making up this freight train,

Second 620, upon this occasion." The operations were exactly those which were intended and designed.

4. The operations were actually carried out exactly as they were intended to be carried out. (a) First as to Second 620: The normal steps to prepare the train for departure were taken in the ordinary way. The deceased and brakeman Newton connected the air hoses and the engineer began pumping up his train. The next step would be a brake test upon a signal from the rear end given by a red fuzee waved across the track after First 11 passed. Under the conductor's instructions this was not to be given, no one could expect that it would be given and it was not given in the face of a passenger train approaching on the main line. Meanwhile conductor Birdwell, at the office, obtained a lineup and learned on what time First 11 was running (a few minutes late), went to the caboose, left his bills, and then walked along the train to the head end giving the lineup to Newton and the deceased as he passed them. When he was talking to the deceased, he pointed out to the deceased the headlights of First 11 which was then in sight approaching. (b) As to First 11: This high speed passenger train, about a mile before it reached the head end of Second 620, had started slowing down for the station stop at Gerber and, as it passed the head end of Second 620, had slowed to 60, or 60-65, miles per hour. There was no violation of any speed restriction. Its bell was ringing. Agreeably to the rules and practices it sounded a whistle signal as it approached the head end of Second 620. The whistle was heard by every witness who testified. It was a signal which indicated a close approach to the head end of Second 620. Agreeably to the rules and practices, as it approached the head end of Second 620 its Mars headlight was shut off and its fixed headlight was dimmed,[5] additional

indications that it was coming close to the head end of Second 620.

5. Brakeman Newton had the same duties as the deceased and was located substantially in the same position as the deceased. That he was alive to testify demonstrates that with the exercise of the slightest care the deceased too would have survived, uninjured.

6. There was nothing unusual in the railroad operations. There was nothing to take anyone by surprise. Such dangers as there were were normal, necessarily inherent in railroad operation, open, obvious and readily understood.

7. The next step in the preparation of Second 620 for departure, was for the brakeman at the head end to receive a signal for the brake test after First 11 passed,—it would not be given and could not be expected to be given in the face of the approach of First 11. In order that this might be readily seen, under the practice "Either the rear man goes out toward or across the main line, or the man at the head end does so." [It was all clear over beyond the main line. Anyone, at the head end, looking to the rear for the signal, by simply crossing the main line, could place himself where the signal readily could be seen and all possible risk of injury from movements on the main line completely eliminated.][e]

8. The only thing that was not normal was the conduct of the deceased. He was an experienced railroad man thoroughly familiar with the locality and all anticipated operations who so conducted himself as to be struck by a passenger train running substantially on schedule, approaching in plain sight for 4 miles, its headlights bright and then dimmed indicating close approach to the point where deceased was standing, sounding warnings of its approach, after his conductor had specifically called his

attention to this approaching train and he had acknowledged the warning. *Res ipsa loquitur.*

Plaintiff's claims, and the issues made by the pleadings are summarized in the opinion of the District Court of Appeal and can be shortly stated:

1. The defendant negligently failed to provide the deceased with a reasonably safe place to work. This claim about the place of work, as distinguished from the work carried on at the place, is eliminated by the modification of the Court's opinion.

2. Negligent operation of the passenger train, First 11. The Court's recitation of the facts eliminates any basis for this claim except on the question of speed. It is not clear what the effect of the modification of the opinion is on this matter. It eliminates as a ground for supporting the judgment the "streamliner schedule". The schedule of any train necessarily involves the speed at which it is operated.

3. If there was any negligence, was it a proximate cause of the death?

4. No issue was tendered by the pleadings nor was any claim made at the trial with respect to the operations carried on in connection with Second 620. The Court now says that the jury may have found upon issues which were never tendered or tried. There never was a claim that the track was too short or the train was too long, or that the brake test signal should have been passed or could have been passed on the other side of the train. There was no testimony, expert or otherwise, touching these matters. There was no claim that the deceased did not know of the approach of First 11, that the defendant failed to take proper steps to warn him of its approach (although no warning was necessary because it was open and obvious) or that the dependant had any reason to anticipate that the

deceased would be unaware of its approach or would fail to take steps to protect himself from injury.

5. Finally, an issue was tendered by the answer as to the conduct of the deceased himself. The answer set up that he was guilty of contributory negligence and that he was guilty of negligence which was the sole proximate cause of the accident.

The conduct of the deceased has double significance. If his negligence was the sole proximate cause of the accident, the judgment and order must be reversed. If it was only a contributing proximate cause the damages awarded must be reduced in proportion to the negligence attributable to the deceased and the award is grossly excessive.

The Court below noticed our claim that there was no evidence of negligence with respect to the place of work,—that the tracks were properly spaced and the signal and oil and water columns were properly placed. In the original opinion it disposed of this with the enigmatic statement: "That may be so considered in the abstract; not necessarily so when viewed in the light of the work in hand, the readying of Second 620 for its northbound trip." The modification of the opinion eliminates this as a possible ground with the statement: "Under the circumstances of this case we do not perceive, nor do we infer that the jury impliedly found, a duty resting upon defendant to adjust its yard lay-out and its streamliner schedule to the operation of making up this freight train, Second 620, upon this occasion."

It holds that the operation of First 11 "was completely regular in full conformity with all applicable regulations of the defendant company." But it concludes, without suggestion of foundation in the evidence, that the jury could have found there should have been a further restriction of its speed below the 60-65 mile an hour restriction. In this

connection, it gives no consideration to the countervening legal duty of the railroad to provide expedited passenger service and the fact that along the whole line of the railroad where high speeds must be maintained there is equally a risk of injury to signalmen, maintenance of way men, crews of trains waiting on sidings for fast passenger trains to pass, crossing flagmen, etc., all of whom, necessarily, must work on or near the main line.

It is said that the jury could have found that the operations in connection with Second 620 should have been planned differently,—that the jury could have found the track was too short or that the train could have been shorter so as to eliminate the obstruction to vision created by the block signal and the oil and water columns or that the brake test signal should have been passed on the other side of the train. The short of what the Court is saying is that the jury could have found negligence because a method of passing the signal was not adopted which would eliminate the risk of being struck by movement of the train on the main line. But no charge of negligence in this regard was ever made. No such issue was ever tried,—no evidence was introduced on the feasibility of any of these suggested practices. But more than all this the Court completely ignores the fact that there was an available method of passing the signal which, at times, was actually used and which would have eliminated all risk and this by the simple election of the man attempting to receive the signal to cross the main line track and get in the clear on the far side as he was admonished by Rule 817 providing that employees, on double track, "should keep outside of and clear of both tracks while train is passing."

Next it is said that there was an inference the deceased was struck by coming in contact with First 11 and that although "precisely how that contact occurred we have no

direct information" the jury could find that one of the assumed acts of negligence was a proximate cause of the death. This is discussed below.

As to the conduct of the deceased, it is said that the jury could find that he did not know that First 11 was approaching, that he was engaged in looking for a signal (which would in no event be given until after First 11 had passed) and that he was not guilty of negligence.

Finally, assuming that the jury found there was no contributory negligence, it is held that the damages awarded were not excessive.

Reason for Allowance of the Writ

The reason for allowance of the writ is that the State Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

Viewing the case as a whole, and not now concerning ourselves with the detail of the steps of the Court's attempted rationalization of the result, the decision is in conflict with *Kansas City So. Ry. Co.* v. *Jones,* 276 U.S. 303. In that case this Court, on certiorari, reversed a judgment of the Supreme Court of Texas which affirmed (by reversing a judgment of reversal of an intermediate court of appeal) a judgment for the plaintiff for damages for death of a car inspector in an action under the Federal Employers' Liability Act. As here, no one saw the death. The body was found between the main track and a parallel track. Plaintiff's hypothesis was that the deceased, inspecting cars on the parallel track, was so absorbed in his work that he did not hear the approaching train but was relying on the bell which was usually rung and which, according to respondent's witnesses, was not rung on this occasion (the case being stronger for the plaintiff, in this respect, than the case at bar in which it appears that warning by whistle

and bell was given). The deceased (as here) knew that the train was due and (as here) was an experienced man. As to the hypothesis that the deceased was engaged in his work, and responsibility the Court said:

> "At best, it is a mere guess that he was so engaged, still more that he was absorbed in such work. The main track was straight and the train was making a great noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself. It is unnecessary to consider whether, if the case for the plaintiff was stronger, the principle of Chesapeake & O. R. Co. v. Nixon, 271 U.S. 218, would apply."

Viewed in more detail the decision of the Court below will be found to be in conflict with other controlling decisions of this Court. The *Jones* case, just noted, completely disposes of the hypothesis that the deceased may have gone toward or upon the main line to receive a signal (which in the circumstances no one could anticipate would be given) from the rear end. This leaves the case as one, properly so characterized by the Court below, in which it appears that a workman was killed as the result of movement of a train but "precisely how that contact occurred we have no direct information". To hold, in such a case, that a jury, without being provided with any standard by expert testimony can find that normal and regular railroad operations constitute negligence and then speculate that the assumed negligence was a proximate cause of the accident when, concededly, no one knows how it happened is squarely in the teeth of the following decisions of this Court:

> *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573 (If the engineer's testimony could be disbelieved the case was left as one with no showing how the deceased came to be run over);

Reynolds v. *Atl. C. L. R. Co.*, 336 U.S. 207 (Negligently permitting cane to grow along the tracks so that a trainman, to pass a signal, was required to go from one car to another provides no basis for finding that this was a proximate cause of his fall from the train);

Eckenrode v. *Penn. R. Co.*, 335 U.S. 329 (Brakeman walking beside locomotive whose wheels were slipping was struck by a moving part of the locomotive; his otherwise unexplained death would not support a recovery);

Brady v. *So. Ry. Co.*, 320 U.S. 476 (Car backed over wrong end of derailer causing it to derail and kill a brakeman; no evidence that someone else rather than the deceased set the derailer);

Penn. R. Co. v. *Chamberlain*, 288 U.S. 333 (Switchman run over during the course of switching in a yard; some evidence that a string of cars struck the string which he was riding);

Atchison, etc. Co. v. *Saxon*, 284 U.S. 458 (Brakeman, running along side of track, fell under and was run over by train; hypothesis that the accident was caused by a soft area or hole rejected although there was a shoe impression in the screenings);

Atchison, etc. Co. v. *Toops*, 281 U. S. 351 (Trainman killed in the course of switching by being run over; mere fact that the cars were backed without signal, light or man riding them was no basis for finding that such assumed negligence caused the death);

Atl. C. L. R. Co. v. *Driggers*, 279 U.S. 787 (Switchman stepped from footboard of locomotive and was struck by fast passenger train on a parallel track);

Chicago etc. Co. v. *Coogan*, 271 U.S. 472 (Brakeman run over by his train; hypothesis that he caught his foot under a bent air pipe rejected).

The *Driggers* case held that the speed of the passenger train had no proximate causal relation with the death. Compare with the foregoing cases the following all standing for the same general proposition:

Wendell v. *Chicago etc. Co.*, 184 F. 2d 868 (Circ. 7);
Healy v. *Penn. R. Co.*, 184 F. 2d 209 (Circ. 3), cert. den. 340 U.S. 935, reh. den. 341 U.S. 912;
Trust Co. of Chicago v. *Erie R. Co.*, 165 F. 2d 806 (Circ. 7), cert. den. 334 U.S. 845;
Fantini v. *Reading Co.*, 174 F. 2d 543 (Circ. 3), cert. den. 325 U.S. 856;
Willis v. *Penn. R. Co.*, 122 F. 2d 248 (Circ. 2), cert. den. 314 U. S. 634;
Blunt v. *Penn. R. Co.*, 9 Fed. 395 (Circ. 6);
Alabama Gt. So. R. Co. v. *Davis*, 246 Ala. 64, 18 S. 2d 737, cert. den. 324 U.S. 346;
So. Ry. Co. v. *Mays*, 192 Va. 68, 63 S.E. 2d 720, cert. den. 342 U.S. 836.

If this case of normal and usual railroad operation is one in which a jury could find negligence then negligence can be found in any case of injury and, for practical purposes, state courts may treat the statute as a compensation act, the very thing which this Court said in *Wilkerson* v. *McCarthy*, 336 U.S. 53, could not be done. (Cf. *Jamison* v. *Encarnation*, 281 U.S. 635; *Myers* v. *Reading Co.*, 251 U.S. 477.)

The explanation of the case at bar rests in the inexcusable conduct of the deceased. He was an experienced railroad man. It must be presumed that he was familiar with the defendant's rules which required him to keep clear of moving trains and to advise himself of their approach,—not to rely on others. (*Director* v. *Templin*, 268 Fed. 483, 485, cert. den. 254 U.S. 656; *Saunders* v. *So. R. Co.*, 167 N. C. 375, 83 S.E. 573, 577.) The train was a scheduled train, one of the only three passenger trains on this division, (Plf. Ex. 4) running substantially on schedule time which appeared in the time table of which deceased was required to have a copy at all times and, it appeared, that every member of the crew did have a copy. The train was in sight over the last four miles of its approach. By light, bell and whistle it gave notice of its approach. Finally, the deceased

was actually warned of its approach by conductor Birdwell. He acknowledged that warning. (Cf. *Wendell* v. *Chicago etc. R. Co.*, 184 F. 2d 868, 871 (Circ. 7); *Chicago etc. R. Co.* v. *Arnold*, 160 F. 2d 1002 (Circ. 8).) Even if, as this train approached, it was the duty of the deceased to look to the rear of his train for a signal there was a clear space across the track from which this could be done and if, in the face of the oncoming train, he selected not that place but a place of danger on the track his conduct demonstrates nothing but his own recklessness. (*Pacific Portland Cement Co.* v. *Bellamy*, 187 F. 2d 701 (Circ. 9).) Nor are any of the Court's suggestions of possible basis for finding negligence on the part of the defendant admissible. Under the *Driggers* case, above, the jury could not find that the speed of the passenger train was a proximate cause of the accident (and cf. *B. & O. R. Co.* v. *Rodeheaver*, —— *Md.* ——, 81 Atl. 2d 63; *Walker* v. *Mo. Pac. R. Co.*, 211 Ark. 635, 201 S.W. 2d 768; *Pepper* v. *So. Pac. Co.*, 105 Cal. 389, 400, 38 Pac. 974.) But, beyond this, it is not an admissible inference that speed would warrant an inference of negligence at a point where the only persons whose presence reasonably could be anticipated would be experienced railroad men fully aware of the necessities of high speed rail transportation,—of the speed that is the essence of the way the business is conducted and must be conducted. Certainly in the absence of provision of some standard by expert testimony or otherwise a jury of uninformed laymen should not be permitted to speculate that standard high railroad speeds on the railroad's own premises constitutes negligence, particularly in view of the fact that though highway and other speeds have been regulated, no statute or rule of any regulatory commission has ever undertaken to regulate such speed of railroad trains and, as a matter of practice, this has been committed to the management of the railroads. (Compare *Penn.*

R. Co. v. *Stegaman*, 22 F. 2d 69, 70 (Circ. 6); *Shaffer* v. *Minneapolis etc. Ry. Co.*, 156 Wis. 485, 45 N.W. 1086; *Tankun* v. *Boston & M. R. R.*, 203 Mass. 59, 18 N.E. 2d 359, 361; *Bassett* v. *Delaware & H. Co.*, 62 F. 2d 74, 75 (Circ. 2); *Markar* v. *New York etc. Co.*, 77 F. 2d 282 (Circ. 2); *So. Pac. Co.* v. *Stephens*, 24 F. 2d 182 (Circ. 9); *B. & O. R. Co.* v. *Deneen*, 161 F. 2d 674, 676 (Circ. 4); *Freedman* v. *New York etc. R. Co.*, 81 Conn. 601, 71 Atl. 901).

In the absence of expert testimony, or other standards provided to the jury, it is equally inadmissible to permit a jury of uninformed laymen to base a finding of negligence upon normal railroading conditions and operations conducted in precisely the way the railroad management determined they should be conducted. "The railroad is required and presumed to know its duty in the matter, and it would seem that the court ought to be equally well informed. It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case." (*So. Pac. C.* v. *Berkshire*, 254 U.S. 415.) It is not only true that this rule applies to conditions of the yard as such and that "such engineering questions" are not to be left "to the uncertain and varying opinion of juries" (*Toledo etc. Co.* v. *Allen*, 276 U. S. 165, 170 following *B. & O. R. Co.* v. *Groeger*, 266 U.S. 521; *Delaware etc. Co.* v. *Koske*, 279 U. S. 7, 11) but "the decision of the managing officers of doubtful questions relating to methods of operation or equipment are deemed to be presumably right and ordinarily they may not be made the foundation of liability to the employee." (*McGivern* v. *Northern Pac. Ry. Co.*, 132 F. 2d 213, 218 (Circ. 8).) "It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employees." (*Tuttle* v. *Detroit etc. Ry. Co.*, 122 U.S. 189.) Of course, when a railroad accident happens and the me-

chanics are such as to fall within the common experience of laymen then as in *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, referred to in the opinion below, the matter may become one for the jury on the proven facts as to how the accident happened. But here we have no such case.

Conclusion

It is believed that no case can be found, whether within or without the federal statute, which has permitted recovery in circumstances such as appear here. That this is so is not remarkable in view of this Court's decision in *Kansas City So. Ry. Co.* v. *Jones*, above. It is submitted that that case was correctly decided and that state courts, deciding cases under the federal statute, should not be permitted to emasculate it by the simple process of ignoring it.

It is reasonably obvious that this Court cannot and will not undertake to review every decision under the Federal Employers' Liability Act where it is claimed that the evidence is insufficient to show negligence or proximate causal connection. But when, as here, that a state court has gone far beyond the bounds of propriety is demonstrated by a decision of this Court it is submitted that it is the duty of this Court, in the interest of uniform interpretation and application of the federal statute (*Brady* v. *So. Ry. Co.*, 320 U.S. 476), to exercise its supervisory function and restrain the state court within legitimate bounds.

It is believed that this cause is a peculiarly appropriate one for the exercise of this Court's discretion to assume jurisdiction and exercise its power of review and correction of the decision of federal questions. The record is comparatively simple. There were no disputes in the evidence which must be reviewed and put to one side before determining the question presented. Indeed, no review of the record at all is required. The statement of the facts of the Court

below can be taken and upon this basis alone the question should be reviewed. Indeed, the case is a proper one for summary disposition in view of this fact and the controlling decision of this Court in the *Jones* case.

It is prayed that the petition should issue and the judgment below be reversed.

Dated at San Francisco, California, September 4, 1953.

ARTHUR B. DUNNE,
Counsel for Petitioner.

Footnotes

[1] Advance California Appellate Reports. The opinion of the District Court of Appeal, when finally and officially reported will appear in Volume 117, California Appellate Reports, Second Series (117 C.A. 2d).

[2] Advance California Reports.

[3] Otherwise unidentified statements of fact, within quotations are from the opinion of the Court below. This quoted language was the Court's.

The attorney for the plaintiff, on the trial, said of the deceased: "As far as I know, I don't think anybody knows exactly where he was at the time of the accident." (R149)

[4] Whatever else the modification of the opinion means certainly this aspect of the case falls within the Court's language that "We do not perceive, nor do we infer that the jury impliedly found, a duty resting upon defendant to adjust its yard, layout * * * upon this occasion."

The primary claim in this respect was that there was not sufficient space between the main line track and the track on which the freight train was standing. In this regard there was no evidence except that the space at this point was greater than at other points along the railroad. No evidence that it was not sufficient could have been produced as is demonstrated by the fact that the clearance was greater than that provided by any statute or any order of any regulatory commission in the country. The data in this regard was set out in our Reply Brief at pp. 41-47. This explains the reference in the Court's opinion to the "regulations of the federal government and of this and other states."

There was no suggestion of any kind in the evidence that the signal and the oil and water columns could be put at any place except next to the main line and at the points at which they were located.

[5] This was not only required by defendant's rules but was contemplated by the rules of the Interstate Commerce Commission, Rule 231(c).

[6] The highly significant factual considerations stated within brackets are ignored in the opinion of the District Court of Appeal. There was no dispute about them.

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

No. 15391

[117 A. C. A. 643, 256 P. 2d 603]

MARY MILLER, Administratrix of the Estate of Fred A. Miller, Deceased, *Plaintiff and Respondent*,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, *Defendant and Appellant*

Opinion

This is an action against the Southern Pacific Company brought by the administratrix of the estate of Fred A. Miller, deceased, for the benefit of the widow and four minor children of the deceased for damages for his death which occurred as the result of injuries suffered by him while employed by the defendant in interstate commerce.

The action was brought under the Federal Employers' Liability Act which declares that every common carrier by railroad while engaging in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (45 U. S. C. A., § 51).

In any such action the "employee shall not be held to have assumed the risks of his employment in any case [where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case] [1] where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." (45 U. S. C. A., § 54.) In any such action "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be in-

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[1] The words within these brackets were inserted by amendment of the section in 1939. (Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404.)

In *Tiller* v. *Atlantic Coast Line R. Co.* (1943), 318 U.S. 54, the Supreme Court held that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'." (P. 58.)

The court in the *Tiller* case traced the origin and history of the assumption of risk doctrine (pp. 58-64), and concluded that the "result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed." (P. 64.)

The court in that case further concluded that "the employer's liability is to be determined under general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.' Of course in any case the standard of care must be commensurate to the dangers of the business." (P. 67.)

Justice Frankfurter, concurring, made this comment: "The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee 'assumed the risk' of its negligence. But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care." (P. 72.)

jured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." (45 U. S. C. A., § 53.)

At the time of the injury the decedent was working as a brakeman in defendant's yard at Gerber, California, engaged in making up a freight train which was soon to leave for the north. That train was on a side track, parallel to the main line, headed north. Decedent was last seen, prior to the accident, standing on the ground near the head of the freight train and between that train and the main line. Shortly thereafter a southbound passenger train passed that point. The gist of the first count of the complaint is that decedent was standing at the head end of the freight train engaged in attempting to receive a signal from another employee who was at the rear end of the train; that defendant, in disregard of its duty of exercising ordinary care to provide decedent with a reasonably safe place to work, carelessly and negligently constructed and maintained a certain signal box with arms located between these two tracks in such a position as to obstruct the view of the decedent in attempting to receive the signal from the brakeman at the rear of the train; that in order to see the signal it was necessary for decedent to, and he did, stand alongside of the main line, and as a result of defendant's said carelessness and negligence decedent was struck by th southbound train, as a proximate result of which he eceived the injuries. In the second count of the complaint, plaintiff additionally alleged that at the time and place mentioned defendant, by and through its employees other than decedent, carelessly and negligently operated the passenger train on the main line in a southerly direction and that by reason thereof and defendant's careless and negligent construction and maintenance of the signal and as a direct and proximate result thereof, the passenger train struck decedent and injured him.

The jury awarded plaintiffs a verdict for $80,032.50 and judgment was entered thereon. Defendant moved for a new trial and for judgment notwithstanding the verdict. Upon

denial of those motions defendant appealed from the judgment and from the order denying its motion for judgment notwithstanding the verdict. Upon this appeal defendant presents two questions: (1) Is the evidence sufficient to sustain the verdict, and (2) Is the amount of damages awarded excessive?

(1) *The issue as to the sufficiency of the evidence to sustain the verdict* poses these questions: Is the evidence sufficient to support implied findings that defendant negligently failed to provide a reasonably safe place of employment or negligently operated the passenger train, and if so, in either case, was such negligence a proximate cause of the injury suffered by decedent Miller? There is involved no violation by defendant of any statute enacted for the safety of employees. A fairly detailed statement of the pertinent facts is desirable.

Miller, the decedent, had worked for the defendant, as a brakeman on the Shasta Division, since 1943. He had worked in and out of Gerber. He was familiar with the physical set up of the yard and with the operations being conducted. For the last 30 days he had been operating between Dunsmuir and Gerber as a member of the same crew as on this occasion. He and his fellow crew members reported for duty at sometime prior to 5 o'clock on the morning of October 2, 1950. The crew consisted of the conductor, engineer, fireman, and three brakemen. Miller was one of the brakemen.

Their train, the second section of No. 620 (Second 620) consisting of 95 freight cars and a diesel locomotive of 4 units, stood on the side track immediately west of and parallel to the main line track with its caboose about 300 or 400 feet north of the Gerber depot and its head end approximately 4800 feet to the north of the caboose. The distance between the two tracks, measured from center to center between the rails, was 17 feet 11 inches, with a clearance of about 7 feet 2 inches between trains when both tracks are occupied.

The first section of No. 620 (First 620) was on a side track parallel to and west of the side track first mentioned.

Neither section could leave until it had been readied by its crew nor until a fast passenger train (First 11, The Cascade Limited) arrived from the north. Second 620 could not leave until First 620 had pulled out. First 11 was due at Gerber at 4:55 a. m. It was a few minutes late. Its head end passed the head end of Second 620 at 5:07 a. m.

Miller and Lyman G. Newton, head brakeman, met at the caboose of Second 620 and proceeded to walk the length of the train from the rear to the head end, Miller on the left side and Newton on the right, inspecting the train and connecting air hoses where necessary. They were still on opposite sides of the train when they arrived at the rear end of the locomotive. Newton then connected the air hose of the locomotive to that of the first car. (That was the last time he saw Miller until after the accident.) The engineer then commenced pumping up the train,[2] a process which continued until after First 11 had passed by. Newton retraced his steps part way for a distance of about 20 cars to see that the air was coming through, then turned and proceeded forward again until he reached a point three or four cars back of the locomotive. He remained there until First 11 passed. He said he was more or less looking back toward the rear of his train when First 11 went by and he saw it about as it passed by. He stepped back between two cars of his train, as a safety matter, there being suction from a train going by there, from a streamliner, when it goes by at a high rate of speed.

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[2] The brakes of a freight train are operated by compressed air. The air is furnished by compressors on the diesel units of the locomotive. It is transmitted the length of the train, to each car on the train, by pipes built onto the cars. The pipes of the cars are connected by air hoses which are coupled at the point of coupling of the cars. The first thing to be done after the air hoses are coupled is for the engineer to pump up his train.

To make sure this work is properly done and that the brakes are working, a test must be made before the train can leave. The method of making this test, and the method followed on this occasion, was to pump up until a gauge in the caboose registered 65 pounds. When this pressure in the caboose has been reached, the rear brakeman gives a light signal to the head end of the train. The brakeman at the head of the train, on receiving this signal, passes it to the engineer, and the engineer then makes his brake test.

Meanwhile, the conductor, S. H. Birdwell, reported at defendant's Gerber office, obtained his bills and the line up (statement of what trains were moving, with respect to which he would have to govern the operation of his own train), went to the caboose, left his bills there and then walked to the head end of the train, leaving the rear brakeman, Nelson, at the caboose. On the way he passed Newton, gave him the line up and then went on and met and spoke with Miller who was then standing between the freight train and the main line about opposite the middle of the first diesel unit; that Miller was then where he, the conductor, instructed Miller to be. First 11 was then in sight, coming through Rawson, 4.1 miles away. Its headlights could be seen. (Between Gerber and Rawson the main line track is straight.) Conductor Birdwell further testified: "When I arrived at where Mr. Miller was standing I gave him the line up of what we were doing, when we were going to leave, and trains approaching us." "When I spoke to Mr. Miller I told him that was First 11, and that we were stuck there for an opposing extra train . . . He said 'O. K.'" Birdwell also said he had given instructions to his crew not to give the brake test signal when a train was approaching on the main line track. He was then asked "You never did tell Mr. Miller that, though, did you—the swing brakeman?" He responded: "Mr. Miller was not working on the rear of the train." Continuing, Birdwell testified that he was the only man of his crew who knew that First 11 was late, he having received that information from the telegraph office. He added that in railroad practice if one does not have information that a particular train has arrived, "it is late." Upon leaving Miller, Birdwell got in the cab of the locomotive of Second 620, gave the orders to the engineer and the fireman and was there when First 11 passed the head end of Second 620.

Concerning the speed of First 11, the defendant's applicable regulations were as follows: A speed board is placed 3/4 of a mile in advance of the point where the restriction is effective, to give a train time to reduce its speed. At speeds in excess of 51 miles an hour, when a train is making a change in speed, a tolerance of five miles per hour is

allowed. Near Proberta, 1 mile north of Kiska,[3] there was a speed board indicating 60 miles per hour. Just north of Kiska there was a speed board indicating 35 miles per hour, effective at a point 3696 feet south of Kiska. The head end of Second 620 was 878 feet south of Kiska. Hence the authorized speed limit for First 11 at the head of the freight train and at the spot where Miller was found, was 60 to 65 miles per hour. The engineer of First 11 testified that he was making 79 miles per hour up to the 60 miles per hour speed board north of the Proberta road crossing; that he then started to slow down; that he shut off his engines and used the dynamic brake; that the speed was reducing as he was getting into Kiska and as he passed the head end of Second 620. He testified that as he passed Kiska he would judge that his speed was between 70 and 65 miles an hour, a point 878 feet north of the head end of Second 620. First 11's speed tape showed no violation of speed restrictions. It showed that the speed was 70 miles per hour at Kiska and that then a rapid deceleration began, and that there was still a rapid deceleration as the head end of the streamliner passed the head end of Second 620; that from the point where speed started dropping off from 70 miles per hour, it dropped off to 60 miles per hour in slightly over 1/8 of a mile, in approximately 700 feet. That indicates a probable reduction of speed to 60 miles per hour (possibly between 60 and 65 miles per hour) before First 11 reached the head end of Second 620.

First 11 was equipped with a headlight that could be dimmed, a Mars light (one which swings in a figure eight), classification lights, a bell which rings automatically after being turned on, and an air horn. The Mars light is turned off and the headlight dimmed upon approaching another train, to facilitate identification by rendering the identification lights more readily observable. First 11 was required to signal Second 620 by whistle, and Second 620 to respond by whistle. Each train complied with this requirement. The engineer of First 11 testified that about 20 to 25 car lengths north of Kiska he shut off the Mars light,

[3] Kiska is one mile north of Gerber.

dimmed his headlight and then gave the whistle signal; that before this he had started the automatic bell ringing, about 1,000 feet north of the crossing at Proberta, and that the bell continued to ring until the stop at Gerber. The engineer of Second 620 testified that he first saw First 11 when it was north of Proberta; that the Mars light was then operating and the headlight was on bright; that he did not notice it again until it whistled, and at that time the Mars light was off and the headlight dimmed; that it started to whistle when it was 200 feet or more away and that its bell was then ringing. The fireman of Second 620 said the Mars light was on and the headlight was on bright when he first saw First 11; that he could not say when the Mars light was shut off; that the fixed headlight was dimmed at 10 to 15 car lengths before First 11 passed the head end of Second 620; that the whistle signal was given about when the headlight was dimmed and that this was at about a certain point which was 878 feet north of the head end of Second 620. Newton, the head brakeman of Second 620, was unable to say when the Mars light was turned off or the headlight dimmed, but testified that First 11 sounded its whistle beginning about 200 feet before it reached the engine of Second 620 and it continued to blow.

During the approach and passing of First 11, the freight train's diesel engines were operating, pumping air into the brake system, making considerable noise. All four diesel units were running. In spite of this noise, the engineer, fireman, conductor and head brakeman of Second 620 heard the whistle of First 11 as it approached.

Richard H. Williams, a freight conductor who had worked on defendant's Shasta Division for 28 years, testified that when a train travels at 65 to 79 miles an hour it creates a suction which has a tendency to cause a person to lose his balance and be drawn down and around and off his feet if he is close enough to the train. The witness said "in that particular spot [where Second 620 was being made up and First 11 was passing] there is room for you to get clear back away from the train a good distance." George R. Beatty, a brakeman in the employ of defendant on its Sacramento Division, who had worked on the Gerber yard for

three months in 1950, said that lots of suction is created by high speed trains.

Defendant had in force certain safety regulations governing the conduct of trainmen, including Miller, in the situation described. Among them were these: ". . . safety is one of the first importance in the discharge of duty. Obedience to the rules is essential to safety and is required." (General Notice) Each employee is required to have a copy of the rules and a time table when on duty (Rules A and 841). (Every member of the crew of Second 620 had a time table.) "Employees must keep sufficient distance from passing trains to avoid possibility of being struck by anything projecting or that may fall or be thrown therefrom. On double track, they should keep outside of and clear of both tracks while train is passing. They must not depend on others to notify them of approaching trains, engines, or cars." (Rule 817) "Look in both directions before crossing any track and be especially careful when coming out of or from behind an engine, car, building, or other structure." (Rule 2001) "Never cross tracks closely in front of moving trains, cars, and engines." (Rule 2002) "Always keep safe distance from passing cars, engines, and trains, to avoid being struck by falling or projecting objects." (Rule 2111)

After First 11 had passed and was in the station at Gerber, Nelson, the rear brakeman, gave the light signal for the brake test. Newton picked it up and undertook to relay it to the head end. He got no response. So, he walked toward the head end and found Miller unconscious, lying between the side track and the main line at about the rear of the first unit of the diesel locomotive. Miller's lantern was upright on the ground midway between the side track and the main line, about 8 to 10 feet north of him and toward the head end of Second 620. His comb and pencil were found about 10 feet south of him. The signs of injury observed were fractures of the right leg and right wrist and bruises on the back and rib area to the right. Newton said that the place where Miller was found was a part of his proper position in the performance of his duties. When Miller was working for conductor Birdwell, that is where

the witness would expect Miller to be. One of Miller's duties was that of looking for the signal from the rear man.

Between the spot where Miller was found and the rear end of the freight train, there were a water column, an oil column and a semaphore block signal, situate between the main line and the side track. Several hundred feet south of Gerber there is a lighted three-phase approach signal. This signal shines to the north so that if one were standing north of Gerber and looking to the south he would be looking into those signal lights. At the time of this accident, the Gerber station was lighted and in addition to the signal lights south of the station there was a flood light at Gerber. The practice, in the Gerber yard, in the circumstances that existed at the time of this accident, of giving the signal at the rear end of the train, was by use of a fusee. A fusee is an object similar in form to a candle which can be lighted at one end. It burns with a red light. The method of giving this signal by the rear brakeman is to waive this red light horizontally across the track. Because of the oil and water columns, the block signal and the lights mentioned, it is difficult for a man at the head end to get this signal from the man at the rear of the train if both stand between the side track and the main line and close to the train on the side track. Accordingly, either the rear man goes out toward or across the main line or the man at the head end does so.

Wilson R. Callick, a brakeman in the employ of the defendant on its Shasta Division since 1937, testified that in making up a 95 car train having a 4-unit diesel and a caboose, on this side track, the caboose is south of these obstructions (the oil and water columns and the block signal). Newton said that in making the brake test signal, the man giving it or the man receiving it has to move over to the main line "especially if the caboose is where it was that particular morning. It is behind . . . that water column and the oil column, and up above that a ways there is a signal in line, and it is easier to see if you step over." Beatty testified that with a train the length of Second 620 the caboose would be about 100 feet south of the oil column. Williams said the oil and water columns

were practically together, within a few feet of each other. The block signal, it would appear, was a short distance north of these columns. The exact distance in feet or yards, apparently, was not given. Asked if it was necessary to move over to the main line to get the brake test signal, Birdwell said: "I don't know what the factor is that entered into it exactly, unless it is the length of the train, but sometimes you have got to separate that light from other objects back there—I mean that light from your caboose."

No one saw Miller at the time of the accident. The circumstances warrant the inference that he was injured during the passage of First 11, by coming in contact with it. Precisely how that contact occurred we have no direct information.

Plaintiffs claim (1) that the narrow working space (7 feet 2 inches of clearance when both tracks are occupied) and the obstructions to the view of the brakeman (block signal, water column, and oil column) would support an implied finding that the defendant negligently failed to furnish Miller a reasonably safe place of employment; (2) that the operation of the passenger train, First 11, at an excessive rate of speed, turning off its Mars light, dimming its fixed headlight, and free-wheeling (thereby making less noise than with the diesels operating) would support an implied finding that defendant was negligently operating First 11, charged as defendant was with knowledge that men were at work in the Gerber yard making Second 620 ready; and (3) that the jury could reasonably infer that Miller, in the performance of his duty to watch for and relay the rear brakeman's signal, not aware of the approach of First 11 and having no way of determining its speed, drew near to the main line track to watch for and observe the rear brakeman's signal, and was hit by First 11 or stepped into or was sucked into the side of First 11 or was thrown down by the suction created by it.

Defendant criticises the plaintiffs' analysis of the facts in evidence. It claims that the nearness of the tracks and the presence of the block signal, water column and oil column did not furnish evidence of a negligent failure to

provide a reasonably safe place of employment because there was no evidence that higher standards could reasonably be required; i.e., these tracks were further apart than is usual (indicated by the testimony of one witness and by regulations of the federal government and of this and other states), and the obstructions mentioned were necessary facilities which would not be useful if placed elsewhere. That may be so when considered in the abstract; not necessarily so when viewed in the light of the work in hand, the readying of Second 620 for its northbound trip.

Defendant further claims that there was nothing about the operation of the southbound passenger train, First 11, that indicates negligence. That operation was completely regular, in full comformity with all applicable regulations of the defendant company. That is a factor which merits serious consideration. Yet the jury may quite properly have weighed in the balance the possible need and feasibility of the defendant imposing upon First 11 a much slower speed than 60 to 65 miles as it passed the head end of Miller's train, charged as defendant was with knowledge of the work Miller and his fellow crew members were doing.

Defendant also contends that the evidence shows that Miller was charged with knowledge that First 11 was soon to arrive, and that he was expressly notified of its approach when the conductor spoke to him and gave him his line up, at which time First 11 was but 4 miles away with headlights visible. Of this we may observe that merely handing Miller his "line up," while he was standing there in the dark, did not of itself give him actual knowledge of the immediacy of the advent of First 11. Nor did the conductor's telling Miller "that was First 11" and Miller's responding "O. K." compel the jury to conclude that Miller heard and comprehended all that was said. The noise which the diesel of his train was making may have obscured much of that, and there is a basis for an inference that he was looking toward the rear, not toward the oncoming passenger train. Having crossed from the left to the right side of his train after completing his work of inspection, he placed himself where his conductor instructed him to be, in a position that would enable him to perform his duty of watching

for the brake test signal and of relaying it to the engineer. These facts would warrant the inference that he was actually engaged in the performance of that duty, unaware of the imminence of the approach of First 11.

"To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due car for his own safety at the time of his death." (Tennant v. Peoria P. U. Ry. Co., 321 U. S. 29, 34.)[4]

These are not all of the factors which the jury may have considered and weighed. There are two aspects of the problem: (1) The possible adjustment of defendant's yard lay out and its streamliner schedule to the local operation of making up a freight train, and (2) the possible adaptation of this local operation to the yard lay out and the main line schedule. We have considered the former; i.e., whether the tracks should be spaced further apart, the oil and water columns and block signal relocated, and the speed of the streamliners reduced as they enter Gerber yard.[4a] How about the other aspect? Might it be feasible to so change the method and manner of making up the freight train and of giving the brake test signal as to avoid or reduce the hazards to which Miller was subjected?

Miller's conductor indicated it was the length of this freight train which put the caboose so far back. The jury may have considered that this particular side track was too short for the making up of so long a train, that the omission of a few freight cars would have placed the caboose north of the black signal and the oil and water

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[4] Under the circumstances of this case it is not necessary to consider whether the jury was instructed concerning this presumption. It is a part of the law applicable to the case, like the provisions of the Federal Employer's Lability Act itself (*Grand Trunk Ry. Co.* v. *Lindsay*, 233 U.S. 42, 48; see note in Ann. Cas. 1914 C. 171) and administrative regulations issued under sanction of the Federal Boiler Inspection Act (*Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481, 488-489).

"Especially when, as here" said the court in the *Lilly* case, "the rule only fortifies a result which we think the jury could probably have reached even in the absence of such a rule", a statement equally apt in the instant case.

[4a] It is here that by the order of May 29, 1953 a sentence is to be inserted. See p. 25 below.

columns, eliminating the obstructions to vision and making it unnecessary for either of the brakemen to step near or onto the main line track. Or, the jury may have considered it unreasonable to require that the brake test signal be given on the right instead of the left side of Second 620, in the situation which obtained on this occasion. We infer from some of the evidence that it is customary to give such a signal on the right side of the train because the engineer is on that side. But on this occasion the signal had to be relayed to him through two brakemen. If given on the left side of the train, it would be relayed to him through two brakemen and the fireman. Such a procedure in this case would have avoided the obstructions to vision afforded by the block signal and the columns, and the exposure of Miller to the hazards of a fast moving streamliner. The track to the left of Miller's train was occupied by the first section of 620. The latter would not leave until after First 11 had passed by. If First 620 should start to move before the giving of the Second 620 brake test signal, it would not attain any considerable speed before it had cleared the head end of Miller's train.

These are factors quite within the competency and province of the jury to consider and weigh in ascertaining and determining whether defendant was negligent and, if negligent, whether Miller's injury and death proximately resulted therefrom, and the further question whether Miller's injury resulted in part from his negligence, if any.

We conclude that the evidence supports the implied finding that defendant was negligent and that such negligence was the sole cause of Miller's injury.

This analysis finds precedent and support, if any be needed, in Bailey v. Central Vermont Ry., 319 U. S. 350. Bailey was injured during the unloading of a hopper car filled with cinders. The car was pulled onto a bridge over a cattle pass so that the cinders could be dumped through the ties in the bridge floor onto the roadway 18 feet below. The only footing at the side of the car was about 12 inches wide, 8 or 9 inches of which were taken up by a raised stringer. There was no guard rail. The doors in the floor of the car are opened from the side by a man turning a

nut on the end of a shaft by means of a wrench while another man disengages from a ratchet a dog which holds the shaft. When the doors start to open the shaft spins and the operator of the wrench must let go of it lest he be thrown off balance or knocked down. Upon this occasion Bailey operated the wrench, the shaft spun, and he was thrown onto the roadway below.

The hopper car could have been opened before it was moved onto the bridge. Any cinders which spilled on the roadbed could have been shovelled onto the roadway beneath the bridge or a railroad tie could have been used to push the cinders from the roadbed to the ground below the bridge.

A motion by the defendant for a directed verdict was denied. Upon appeal the judgment was reversed by the state Supreme Court upon the ground that negligence was not shown.

The Supreme Court of the United States took a different view. "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (Tiller v. Atlantic Coast Line R. Co., supra) as well as issues involving controverted evidence. Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445; Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 572. To withdraw such a question from the jury is to usurp its functions.[5]

[5] See also Ellis v. Union Pacific R. Co., 329 U.S. 649, in which the petitioner with other members of his crew was engaged in backing an engine around a curve on a spur track where visibility was obstructed by

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." (Pp. 353-354 of 319 U. S.)

The Bailey decision furnishes the answer to defendant's contention, based upon earlier cases, that a jury is not competent, without the aid of expert testimony, to consider and determine whether or not a railway company has been negligent in the planning, construction or use of its facilities; at least, in so far as those factors are involved in the instant case.

Defendant invokes a number of the earlier cases which enunciate a rule or principle that a jury must not speculate when drawing inferences from probative facts, cases which made a severely restrictive application of that principle. The answer, in our case, is furnished by the following clear and cogent statement of the Supreme Court in the recent case of Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle

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a building located on the inside and near the middle of the curve. He was standing on the ground on the same side as the building and to the right of the engine, and was controlling operations by hand signals to the engineer.

the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (P. 744 of 66 S. Ct.) That principle, as thus defined, applies here.

(2) *In ascertaining whether or not the amount of damages awarded was excessive,* there are two principle elements to consider: (a) damages "for the benefit of the surviving widow . . . and children" of the employee (45 U. S. Code 51), and (b) damages accorded by "Any right of action" given the injured employee by this statute, a right of action which survives "for the benefit of the surviving widow . . . and children" of such employee (45 U. S. Code 59).

We do not know how much the jury awarded for either of these two types of damages. Their award was in a lump sum, $80,032.50. Defendant divides this into two amounts: $60,032.50 to the widow and children for loss of support and $20,000 for conscious pain and suffering of the deceased. Before we consider the propriety of such a division of the award, let us take a look at the facts which bear significantly upon the issue of damages and the several elements of compensable injury in this case.

Miller died at the age of 37, with a life expectancy of 30.35 years. He was earning $4,200 a year. He had expenses of $900 to $1,000 a year applicable only to himself, while away on the road. He left surviving him his widow and four children (three sons and one daughter) of the ages of 12, 9, 7 and 6, respectively.

The plaintiffs took $250 per month as Miller's contribution to the widow and children. Their expert computed the present value of this amount, upon a 3% basis, at $60,032.50.

There was no proof of special circumstances indicating

that any of the children would be a dependent after attaining his majority. Defendant would pare this item of $60,032.50 down to $39,755.00 upon the theory that an aliquot part of the $3,000 yer year should be credited to Miller and that his share would increase proportionately as each child in turn attained 21 years. Upon this basis, the widow and children would be credited with 5/6th of $3,000 each year for the first 9 years, 4/5th during the next three years, 3/4th for the next two, 2/3rds during the year following. Thereafter, during the remainder of Miller's life expectancy, none of the children would benefit and the widow would be credited with but half of the $3,000 per year.

Defendant does not treat of the evidence which bears upon the care, attention, instruction, training, advice, and guidance which Miller could reasonably be expected to give his children had he lived. These are proper elements of pecuniary loss to them and are recoverable as such. Evidence of his ability and interest in training and guiding his children is proper and significant to show the value of that loss. (Mobile E. & R. Co. v. Williams, (Ala. 1933), 147 So. 819, cert. den. 290 U. S. 655. See also 74 A. L. R. 11, at 93-116, including 96 and 101-102.) Miller was greatly interested in his job as a railroad man. In addition he had done some writing and some of his writings had been published. He was a devoted father to his children and took an interest in their school work and in their training. He was interested in their athletic progress, helped a good deal with their work at school and in addition instructed them in outdoor living, fishing and camping. He was a committee man with the Boy Scouts and helped out at meetings whenever he could. We do not know how much the jury awarded for the children's loss of their father's care, attention, instruction, training, advice, and guidance. It well may have been a very substantial sum.

Concerning Miller's conscious pain and suffering, the jury had before it the testimony of Newton that Miller was unconscious when found, but regained consciousness and when he left in the ambulance he had been conscious, groaning, and in great pain for about twenty minutes. There is no evidence concerning his condition thereafter, except that he

died at 7:45 A.M. of that day. Because of such lack, defendant argues that the jury had before it evidence of but 20 minutes of conscious pain and suffering; hence, under the rule of no recovery when injury and death are substantially simultaneous, defendant says there can be no recovery. It is not that simple. A person in great pain and suffering can live a veritable lifetime in but a brief interval. A twenty-minute period of great pain and suffering is not to be shrugged off as infinitesimal, too minute for the law to count or to care. Moreover, the jury was entitled to infer, quite reasonably we believe, that Miller continued to suffer for an appreciable period, perhaps until he arrived at the hospital, perhaps until the very moment of death. We could not undertake to substitute our judgment for that of the jury and the trial court that $20,000 was not excessive compensation for Miller's conscious pain and suffering even if we were to assume, as does the defendant, that the jury awarded that amount for that purpose.

By the process of reasoning described,[6] defendant would account for $60,000 of the lump sum award of $80,000. The difference, $20,000, readily could be accounted for as the award to Miller's children for the loss of their father's care, attention, instruction, training, advice and guidance; not an excessive amount for four children ranging from 6 to 12 years, bereft of a father who loved them, took a tender interest in them, and possessed the personal qualifications this father exhibited, to lead and guide them throughout the years of their development into the full flower of manhood and womanhood.

We conclude that the damages fixed herein by the jury and approved by the trial court, when it denied a new trial, are not disproportionate to any reasonable limit of compensation, certainly not so disproportionate as to indicate that the award was the result of passion, prejudice, or cor-

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[6] Our use of defendant's breakdown and analysis of the lump sum award is no indication that we deem it legally proper to make the various assumptions involved; e. g., the assumption that the jury awarded $20,000 for Miller's pain and suffering and $60,032.50 for the support of his widow and children. We have used that method and those figures merely by way of illustration and as a convenient vehicle of discussion supplied by the defendant.

ruption on the part of the triers of the facts. Peculiarly apt are the words of the Supreme Court of this state in the recent case of Ericksen v. Southern Pacific Co., 39 Cal. 2d 374, at 382: "The claim that the verdict was excessive was passed upon and rejected by the trial court on the motion for a new trial. The amount of damages fixed by the jury and thereafter approved by the trial court will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice, or corruption on the part of the triers of the facts." (See also Sherman v. Southern Pac. Co., 34 Cal. App. 2d 490, 499-500, hearing by state Supreme Court denied, cert. by U. S. Supreme Court den., 309 U. S. 669; Fritz v. Pennsylvania R. Co., 185 Fed. 2d 31, 36-37, $70,000 award, deceased railway yard conductor aged 32, life expectancy 36 years, widow aged 29, two children of 9 and 6 years respectively; and Affolder v. N. Y., C. & St. L. R. Co., 339 U. S. 96, 101, 70 S. Ct. 509, 511, judgment of $80,000 for yard worker's loss of a leg deemed "not monstrous in the circumstances of this case.")

The judgment and the order appealed from are affirmed.

WOOD, (FRED B.), J.

We Concur:

Peters, P. J.

Bray, J.

[Endorsed]: Filed Apr. 30, 1953. Walter S. Chisholm, Clerk.

[118 A. C. A. 137]

ORDER MODIFYING OPINION ON DENIAL OF REHEARING

By The Court:

Good cause appearing therefor, the opinion heretofore filed herein (117 A. C. A. 1[7]) is amended by inserting after

[7] Should be 643.

"Gerber yard." in line 13 on page 655 of 117 A. C. A., the following sentence: "Under the circumstances of this case we do not perceive, nor do we infer that the jury impliedly found, a duty resting upon defendant to adjust its yard layout and its streamliner schedule to the operation of making up this freight train, Section 620, upon this occasion."

Defendant's petition for a rehearing is denied.

Dated: May 29, 1953.

PETERS, P. J., Presiding Justice.

[Endorsed]: Filed May 29, 1953. Walter S. Chisholm, Clerk.

APPENDIX B

Applicable Sections of the Federal Employers' Liability Act

The provisions of the Federal Employers' Liability Act, so far as we are concerned with them are the following:

> Section 1 (45 U.S.C. § 51): "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, ap-

pliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The amendment of 1939 was by the addition of the second paragraph. The first paragraph was not changed but was re-enacted as originally enacted in 1908. (See *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187, 96 L. ed. 205.)

Section 3 (45 U.S.C. § 53): "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

This section remains as originally enacted in 1908.

Section 4 (45 U.S.C. § 54): "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case *where such injury or death resulted in whole or in part from*

the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

This section was amended in 1939 by adding the words which are in italics. The amendment did not change the legal meaning or effect of § 1.

Section 9 (45 U.S.C. § 59): "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

This section was added in 1910 and has remained as originally enacted. This is the section which authorizes recovery in a death case for so-called conscious pain and suffering.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 349

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

MARY MILLER, Administratrix of the Estate of Fred A. Miller, Deceased,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, First Appellate District.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

QUESTION PRESENTED.

The petition of the Southern Pacific Company, a corporation, for a Writ of Certiorari out of this Court is asked upon the grounds that the evidence is insufficient to sustain a verdict based either upon the proposition that defendant negligently failed to provide the deceased brakeman with a safe place to work or that the defendant railroad company was negligent in the operation of the passenger train involved; also it is urged that the decision below is in square conflict with *Kansas City Ry. Co. v. Jones,* 276 U.S. 303.

STATEMENT OF THE CASE AND SUMMARY OF FACTS.

By reason of the inaccurate statement of the facts, by the petitioner, we feel that it is necessary here to make a restatement and summary of the facts which were relied upon by the Appellate Court in sustaining the judgment of the trial Court.

In the early morning hours, a long freight train, Second 620, was being made up in the railroad yard at Gerber, California, to proceed in a northerly direction when ready. It was being inspected and tested in preparation for its departure on the first track west

of the main line and parallel to the main line. The deceased was a member of the crew preparing the train for departure, he being a brakeman. He was actually engaged in his duties as a brakeman at the time of the accident which resulted in his death. He was stationed alongside of the first unit of the Diesel locomotive which was to draw the freight train, and in this position there was a space of approximately seven feet between the freight train and where an approaching streamliner passenger train would pass on the main line. It was not only his duty to be where he was, but he was ordered to be there by the conductor in charge of his crew. The Diesel locomotive by which he was standing was operating and making considerable noise. As he stood alongside of the Diesel locomotive of his train, there was no place for him to step between either the units of the Diesel locomotive or the cars of the freight train to escape the suction of a passing streamliner. It was the duty of deceased to look to the rear of his freight train to observe signals as to whether or not the brake train line was in operation. Although the conductor had advised other members of the crew relative to the giving of the signal by fusee from the rear of the freight train, no such advice or information was given to the deceased. The train that struck the deceased was a streamlined passenger train which approached from the north. As this train approached, it dimmed its headlight so that it was difficult to see and to estimate its speed. Also, it approached free-wheeling or coasting. The only persons who heard the whistles sounded by the ap-

proaching passenger train were those members of the train crew who were in the sound-proofed cabin of the Diesel locomotive of the freight train and were thus insulated against the roar of the operating Diesel engines. Mr. Newton, a brakeman, another member of the train crew of the freight train was some three car lengths south of the deceased, away from the noise and roar of the operating Diesel engines of the freight train, and he did not see or hear the approaching passenger train until it was about to him when he stepped between the cars of the freight train to avoid the suction created by the speed of the passing streamliner. There was no place for the deceased to step to avoid the suction of the passing streamliner. The speed of the streamliner was in the neighborhood of sixty to sixty-five miles per hour as it passed the freight train being made up next to the main line. The deceased, in the performance of his duties, and in the place where he was instructed by the conductor to perform his duties, could not see signals given at the rear of the train unless he moved out next to or across the main line tracks upon which the passenger train approached. This was due to the fact that between where the deceased stood and the rear of the train, there was a water column and semaphore signals which had lights upon it making it difficult, if not impossible, to see signals at the rear of the train as the caboose of the train extended beyond these obstacles some one hundred feet. The conductor of the freight train, a short time before the streamliner train passed the freight train, allegedly had a conversation with

deceased, but because of the roar of the Diesel motors by which they were standing, any conversation would have been obscured or easily misunderstood. After the passenger train had passed, Mr. Newton received a signal from the rear of the freight train and endeavored to relay it forward to the deceased, and not receiving any response to his signal, proceeded toward the head of the freight train and discovered the body of deceased.

The District Court of Appeal, in sustaining the judgment of the trial Court, held that the above facts presented sufficient evidence for the jury to have found in favor of plaintiff's contentions (1) that the narrow working space and the obstruction to the view of the brakeman would support an implied finding that the defendant negligently failed to furnish deceased a reasonably safe place of employment; (2) that the operation of the streamliner passenger train at an excessive rate of speed turning off its Mars light, dimming its fixed headlight, and freewheeling, would support an implied finding that defendant was negligently operating the streamlined passenger train, charged, as defendant was, with knowledge that men were at work in the Gerber yard making up the freight train, and (3) that the jury could reasonably infer that deceased, in the performance of his duty to watch for and relay the rear brakeman's signal, not aware of the approach of the streamliner passenger train, and having no way of determining its speed drew near to the main line track, to watch for and observe the rear brakeman's signal, and was hit by

the passenger train, or stepped into or was sucked into the side of the passenger train, or was thrown down by the suction created by it.

THE DECISION IS IN CONFORMITY WITH THE APPLICABLE LAW OF THIS COURT.

Petitioner has stated that the reason for allowance of the writ is that the State Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court, and in this connection, petitioner states that the decision is in conflict with *Kansas City So. Ry. Co. v. Jones,* 276 U. S. 303. That case is entirely different upon its facts than the case presented here. In that case, the deceased was a car inspector, and it was the hypothesis of the respondent and plaintiff that the deceased was engaged in inspecting cars when he was struck by a passing train. However, the turning point of the case was the fact that there was no evidence that he was engaged in his work at the time that he was injured, the evidence showing that there was nothing for deceased to inspect at the probable time of his death. This is entirely different from the facts presented here, in that the evidence shows without conflict that deceased was engaged in the course of his duties of relaying signals at the time of his death, and that he was in the particular place where he was injured because of the express instructions of the conductor in charge of his work. The cases differ in another respect in that the train which struck the deceased

in the *Jones* case approached making a great noise and showing a bright light, whereas in the present case the train approached with the headlight dimmed and freewheeling or coasting so it would not make any great noise.

The opinion of the District Court of Appeal pin points this distinction:

> "Having crossed from the left to the right side of his train after completing his work of inspection, he placed himself where his conductor instructed him to be, in a position that would enable him to perform his duty of watching for the brake test signal and of relaying it to the engineer. These facts would warrant the inference that he was actually engaged in the performance of that duty, unaware of the imminence of the approach of First 11."
>
> " 'To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death.' (*Tennant v. Peoria P. U. Ry. Co.*, 321 U.S. 29, 34.)"

The more recent decisions of this Court support and are in conformity with the judgment in this case, and the opinion of the District Court of Appeal affirming that judgment. These recent cases all hold that under the facts as presented here, it was for the jury to determine the question of liability and that this finding of the jury based upon the debatable issues presented is not subject to review by this Court.

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 68, 87 L. ed. 610, 617, 618, 63 S. Ct. 444, 143 A.L.R. 967; Bailey v. Central Vermont R. Co., 319 U.S. 350, 353, 354, 87 L. ed. 1444, 1447, 1448, 63 S. Ct. 1062; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 35, 88 L. ed. 520, 525, 63 S. Ct. 409, 15 N.C.C.A. (N.S.) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73."

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when

there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Lavender v. Kurn, 327 U.S. 652, 653, 90 Law Ed. 922, 923.

This Court in the case of *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54, 87 L. Ed. 610, in a case somewhat similar to the facts presented here held that the evidence presented a question of fact for the determination of the jury.

"On the night of March 20, 1940, Tiller was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides. The night was dark and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding on the back step on the side away from Tiller. The bell was ringing on the engine but both trains were moving and the

Circuit Court found that it was 'probable that Tiller did not hear cars approaching' from behind him. No special signal or warning was given."

"Petitioner brought this suit to recover damages under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 et seq. The complaint alleged negligent operation of the car which struck defendant and failure to provide a reasonably safe place to work."

The Supreme Court in its decision fully analyzed the 1939 amendments to the Federal Employers' Liability Act eliminating assumption of risk as a defense, and in holding that the question of liability was for the jury spoke as follows:

"No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. Tennessee V. & G. R. Co., 128 U.S. 443, 445, 32 L. ed. 478, 479. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury.

"We think that the question of negligence on the part of the railroad and on the part of the

employee should have been submitted to the jury. The decision below is reversed and the case is remanded for further proceedings in conformity with this opinion.

"Reversed."

Earlier, this Court in *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 88 Law Ed. 520, announced the rule followed in the foregoing cases as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion.

"Reversed and remanded."

Along with the foregoing decisions of this Court, the recent case of *Bailey v. Central Vermont Ry. Inc.*, 319 U.S. 350, 87 Law Ed. 1444, is further authority in support of the opinion of the District Court of Appeal. In that case it was held by this Court that it was a question of liability for the jury to determine from all the surrounding circumstances and conditions at the time of injury, and that the right to have this question determined by a jury was a basic and fundamental feature of our system of federal jurisprudence.

"The nature of the task which Bailey understood, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground— all these were facts and circumstances

for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, ante, 610, 63 S. Ct. 444, 143 A.L.R. 967, supra) as well as issues involving controverted evidence. Jones v. East Tennessee, V. & G. R. Co., 128 U.S. 443, 445, 32 L. ed. 478, 480, 9 S. Ct. 118; Washington & G. R. Co. v. McDade, 135 U.S. 554, 572, 34 L. Ed. 235, 241, 10 S. Ct. 1044. To withdraw such a question from the jury is to usurp its functions."

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York, 315 U.S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. *To deprive these workers of the benefit of a jury trial in close or doubtful*

cases is to take away a goodly portion of the relief which Congress has afforded them."

"Since the evidence of respondent's negligence in failing to provide Bailey with a safe place to work is sufficient to support the verdict of the jury and the judgment of the trial court, we do not reach the other issues which have been presented by petitioner."

"Reversed".

Whether or not the approaching streamliner passenger train was operated in a negligent manner, under the circumstances, was purely a fact question. Although the train may have been operated within the limit prescribed by the rules of the company, the jury still had the right to determine whether or not the train was being operated without due care. This whole question was carefully considered by the District Court of Appeal of the State of California in the case of *Leet v. Santa Fe,* 66 Cal. App. (2d) 413, where the Court relied upon the foregoing decisions of this Court and states as follows:

"The question of whether the engineer of 'The Chief' was negligent in the operation of his train was to be decided upon the basis of whether he was exercising ordinary care under the circumstances. The mere fact that he may have operated his train at a speed within the maximum limit which was prescribed by statute, rule or regulation as a straightaway speed, did not mean that he could not be found guilty of negligence for operating his train at such speed under the particular conditions and circumstances which

existed at the time and place in question. (Bush v. Southern Pacific Co., 106 Cal. App. 101 (289 P. 190); Whitmeyer v. Southern Pacific Co., 102 Cal. App. 199 (282 P. 1055); Carey v. Pacific Gas & Electric Co., 75 Cal. App. 129 (242 P. 97); 19 Cal. Jur. 634.) Defendant quotes certain language from Hoffman v. Southern Pacific Co., 101 Cal. App. 218 (281 P. 681); and Friddle v. Southern Pacific Co., 126 Cal. App. 388 (14 P. 2d 568), but we find nothing in those cases which is contrary to the views which we have expressed. Defendant also quotes the rule stated in 44 American Jurisprudence 705 but concedes that most of the cases cited in support of the rule were cases involving injured persons who were not employees of the railroad company. We find no case which sustains the view that the questions of negligence and proximate cause were not questions for the jury under the circumstances presented by the record before us. We believe that the late cases involving the Federal Employers' Liability Act indicate that said questions were properly submitted to the jury for their determination. (Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54 (63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967); Bailey v. Central Vermont Ry. Co., 319 U. S. 350 (63 S. Ct. 1062, 87 L. Ed. 1444); Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29 (64 S. Ct. 409, 88 L. Ed. ——); Tuller v. Atchison, T. & S. F. Ry. Co., 62 Cal. App. 2d 852 (145 P 2d 321).)

"The judgment is affirmed."

From the foregoing authorities, it is apparent that this action is not one reviewable by this Court on

certiorari. In the case of *Bailey v. Central Vermont Ry.*, supra, and in *Tennant v. Peoria & Pekin Union Ry. Co.*, supra, and in *Tiller v. Atlantic Coast Line R. Co.*, supra, hearings were granted by this Court because the lower Courts had deprived plaintiff of the right to have his case determined by a jury verdict. The only questions presented by this petition deal with an interpretation of facts, which facts presented no more than a jury question, which question was determined adversely to Petitioner.

CONCLUSION.

It is respectfully submitted that Petitioner's petition states no ground for the granting of a Writ of Certiorari by this Court, and it is therefore submitted that the Petition for Writ of Certiorari by the Southern Pacific Company, a corporation, be denied.

Dated, Oakland, California,
November 18, 1953.

CLIFTON HILDEBRAND,
Attorney for Respondent.

TABLE OF CASES CITED

	Pages
Kansas City So. Ry. Co. v. Jones, 276 U.S. 303	1, 2, 3, 8
Leet v. Atchison, etc. Ry. Co., 66 CA2d 413, 152 P2d 351	3, 4, 5, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 349

SOUTHERN PACIFIC COMPANY, a Corporation,
Petitioner,

vs.

MARY MILLER, Administratrix of the Estate of Fred A. Miller, Deceased,
Respondent.

Petitioner's Reply Brief

Since respondent's brief recognizes that the question posed by the petition in this case is whether Mr. Justice Holmes' opinion for the full court in *Kansas City So. Ry. Co. v. Jones,* 276 U.S. 303, can be ignored by State courts, or is to be overruled sub silentio, little in the nature of a reply is called for.

Respondent's brief says that restatement of the facts is necessary "by reason of the inaccurate statement of the facts, by the petitioner". Since the petitioner relied upon the statement of the facts in the opinion of the court below, no comment is necessary.

Respondent's brief says that as deceased stood alongside the locomotive of his train, there was no place for him to step between either the units of the locomotive or the cars. This statement is wholly gratuitous. He could have stepped between the units of the diesel simply by going to the end of one of those units and stepping into the space between it and the next unit.

There is an attempt to distinguish *Kansas City So. Ry. Co. v. Jones,* 276 U.S. 303, upon the ground that in that case there was no evidence that the deceased was engaged in his work at the time he was injured, while here the deceased was engaged in his work. Far from there being a distinction in this respect, the two cases are the same. In both cases the deceased was in the general course of his employment. In the *Jones Case,* the deceased was in and about the yard in the course of his employment as an inspector. In the case at bar, Miller was near the head end of his train in the general course of his work as a brakeman. But in neither case was there any evidence as to what the deceased was doing as the train which struck him approached. In the case at bar, there was no evidence that the deceased was near the main line for the purpose of receiving a signal, and the undisputed evidence, whether the deceased had been told this or not, was that it could not be anticipated that a signal from the rear end would be given by use of a red fusee in the face of an approaching passenger train.

The only new matter in respondent's brief is a reference to *Leet v. Atchison, etc. Ry. Co.*, 66 CA2d 413, 152 P2d 351. Two things are to be said of the *Leet Case*.

If the *Leet Case* has any significance wider than a decision upon its own peculiar facts, it is in irreconcilable conflict with *Kansas City Ry. Co. v. Jones*, above, and the cases cited at pp. 13-15 of our petition.

In the second place, the *Leet Case* is quite different from the case at bar, and the comparison of the two cases will do no more than fortify what was said in the petition. For the court's convenience, we compare them.

The decision in the *Leet Case* sustained a judgment for the plaintiff in an action for damages for death of a brakeman struck by a passenger train that was proceeding at high speed. The court held that there was evidence sufficient to warrant submission to the jury of the issue whether the speed of the train had proximate causal connection with the accident. The facts were such that the speed in that case could have had connection with the accident since it bore both on the conduct of the deceased and on the conduct of the engineer of the train after he saw the deceased. The facts are radically different from those in the case at bar.

The *Leet Case*:	The case at bar:
Deceased (Waits) was head brakeman of a westbound freight train which was stopped at a refueling station known as Marmon. The railroad was double track, but operated "left-handed" so that the westbound train was on the track to the south and the passenger train, the Chief, operated eastward on the track to the	To the north, the direction from which the passenger train came, the tracks were straight not for a mere 1200 feet but for 4.1 miles.

The *Last Case:*

north. There was a slight down grade from west to east. To the west the tracks were straight for about 1200 feet and then curved to the south[1] and then to the north around a high bluff.

At the point where the head end of the passenger train was stopped, cinders were cleaned from coal-burning engines and were taken across and piled north of the northerly or eastbound tracks and "there was ample evidence to show that the cinder pile rose quite abruptly in close proximity to the northerly track and was quite deep a few feet therefrom" and there was evidence that anyone walking on the pile found the walking rough and his feet would sink in. There was a conflict as to where the hot ashes lay and where the pile was smoking.

At the point where the head end stopped there were refueling, rewatering and cleaning operations that made a great deal of noise "and dust which made it difficult to hear and see." The evidence showed that "it was practically impossible for those in the vicinity of the locomotive to hear any other noise." Admittedly, the pas-

The case at bar:

It was all clear beyond the main line for a man who crossed from between the main line and track No. 1 to the east (geographically) of the main line.

The only noise was that of the diesel motors of Second 620. This did not prevent hearing the whistle of First 11. Every member of the crew of Second 620 who was at the head end testified that he heard it,—conductor Birdwell, engineer Ahlstrom, fireman Murray, and brakeman Newton. There were no atmospheric obstructions to vision.

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1. An examination of the transcript shows that to the south of the tracks there were trees and houses which to some extent obstructed the vision so that a train coming from the west could not be seen until it rounded this first curve to the west. (Tr. 44)

The *Last Case*:

senger train blew its whistle, but apparently deceased did not hear it and 3 other witnesses in the vicinity testify they did not hear it. The extreme July heat resulted in heat waves on the desert and that plus the dust and smoke surrounding the engine made it difficult for anyone in the vicinity to see clearly for any great distance.

It was the duty of the deceased to take a signal from the rear end of the train and to do this he took his position opposite the cab of the locomotive. To get the signal it was necessary for him to be out at least as far as the eastbound track. "The presence of the cinder pile made it difficult if not impossible for deceased to station himself beyond and to the north of the eastbound tracks." As he was standing foul of the main line, he was struck by the *Chief* coming from the west.

"'On the day of the accident, "the Chief" was over 6 hours late. None of the crew of the freight train knew "the Chief" was still west of the freight train or had any reason to expect that it would pass them at Marmon."

The case at bar:

There was no evidence of necessity on the part of Miller to take a signal. Newton was there to take it. [The evidence showed, however, that it was customary for any man at the head end to look for it.] Deceased was not required to be foul of the main line in order to get it if the rear man moved out. He was not required to be foul of the main line to get it when First 11 was approaching for the signal would not be given in such circumstances. In any event, it was not necessary for him to be foul of the main line to get the signal because he could cross the main line, there being nothing to prevent it as in the *Last Case*.

First 11 was substantially on time. Every member of the crew of Second 620 knew it was north of them and was approaching. It could be plainly seen for 4.1 miles before it reached the head end of the Second 620. Con-

The Leet Case:	The case at bar:
The Chief was going 70 miles per hour when it rounded the last curve coming into Marmon. The engineer testified he tried to pick up speed on the down grade. There was evidence the speed was as high as 85 miles per hour when it struck Waits.	ductor Birdwell had called Miller's attention to it. Over a mile away the speed had been 79 miles an hour. It had been reduced to 70 and the train was decelerating not accelerating at the time of the accident. Its speed was down to 70 miles per hour 878 feet before it reached the head end of Second 620 and from there it decelerated to 60 miles per hour in approximately 700 feet.
The engineer whistled about ½ mile west of Marmon. He saw the deceased standing on the eastbound track about 800 feet away and then whistled up until the time of the accident. These whistles could not be heard. During the time he had observed the deceased,[2] the latter did not move and the engineer did not apply the brakes until he was 300 feet away where he lost sight of the deceased. It is obvious that in the circumstances the blowing of the whistle was useless. The speed at which the train was going had a material effect on the ability of the engineer to slow it or stop it after he saw the deceased and on the ability of the deceased to get out of the way after he saw or could have seen the train and on his ability	Running at 79 miles an hour and then decelerating it took First 11 approximately 4 minutes to travel from the point where it was first seen 4.1 miles away to the point of accident. Miller had plenty of time to observe it, and avoid it. Both its whistle and the dimming of its headlight gave notice that it was closely approaching. Its speed had no effect on Miller's ability to avoid it after his attention was called to it and after he should have seen it even if his attention had not been called to it. The engineer of First 11 never saw Miller and there is nothing in the case to show that he could have seen him or should have seen him. The speed of First 11 had no effect on his operation of the train.

2. When the deceased was first seen by the engineer of the Chief he was facing east i.e. he had his back to the oncoming train. (Tr. 573)

The *Leet Case:*

to see the train at all.[3] Atmospheric conditions were bad and the train came around the curve only 1200 feet away. At 70 miles an hour, without obstruction to vision due to atmospheric conditions, it was in sight less than 11 seconds,—at 70 miles an hour it would cover the 1200 feet in about 11 seconds.

The case at bar:

The short of the matter is that in the *Leet Case* it was known what the deceased was doing and how the accident happened and there were facts warranting the inference that if the speed had not been so high the engineer could have slowed his train more effectively, could have signaled more effectively and the deceased would have had an opportunity to get out of the way. In the case at bar we do not know what the deceased was doing or how the accident happened. There is no evidence which would sustain an inference that had the speed been lower the accident would not have happened. In the *Leet Case* there was no showing that the deceased knew the train was approaching. In the case at bar the deceased did know that the train was approaching and simply failed to keep out of its way.

It is respectfully submitted that the petition should be

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3. The engineer of Waits' train saw the Chief approaching and, realizing that Waits did not know of its approach, himself blew two sharp blasts of his own whistle. This evidently attracted Waits' attention for the fireman of his train testified that after this signal Waits turned as if he was turning from the west trying to get out of the way. (Tr. 590) Had there been more time he might have succeeded. The time available depended on the speed at which the Chief was traveling.

granted, that the judgment below should be reversed on the authority of the *Jones Case,* and that if the *Jones Case* is no longer to be followed, it is for this Court to say so in forthright terms.

Dated at San Francisco, California, November 18, 1953.

ARTHUR B. DUNNE
Counsel for Petitioner